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No. 89-51

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MARY A. HOHE, *et al.*,
Petitioners,

v.

ROBERT P. CASEY, GOVERNOR,
COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below abused their discretion in denying a preliminary injunction against the collection of fair share fees.

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BRIEF IN OPPOSITION

The opinions below, the basis for this Court's jurisdiction, and the constitutional and statutory provisions involved are correctly described in the petition for *certiorari*. Pet. 2-3.

STATEMENT OF THE CASE

a. *The Background Facts.* Pennsylvania Act No. 84 of 1988 permits labor unions representing the Commonwealth's employees to negotiate agreements requiring represented employees to pay a "fair share fee" to support the cost of collective bargaining. Pet. App. 13a. The Act limits fair share fees to an amount equal to normal union dues less a proportional reduction equal to the

costs incurred by the union during the previous fiscal year for "activities or undertakings which were not reasonably employed to implement or effectuate the duties of the employee organization as exclusive representative." Penn. Act 84, § 2215(a), Pet. App. 37a. As a "precondition to the collection of fair share fees," the statute requires that the union establish "a full and fair procedure" to protect against any excessive charges. Penn. Act 84 § 2215(d), Pet. App. 38a. The union procedure must include an annual notice containing "sufficient information to gauge the propriety of the fee," and "an impartial hearing before an arbitrator to resolve disputes regarding the amount of the chargeable fee." *Id.* While a challenge is pending, the statute requires that at least 50% of the challenging fee payer's payments be held in an interest-bearing escrow account. Penn. Act 84, § 2215(i), Pet. App. 39a.

Pursuant to this statutory authorization, which took effect on July 13, 1988, the Commonwealth negotiated a fair share fee agreement with Council 13 of the American Federation of State, County and Municipal Employees (AFSCME) providing for deductions to begin on August 16, 1988. Pet. App. 17a-18a. (Under this agreement, Council 13 would not actually receive the fees deducted in August until the end of September. Pet. App. 18a.)

Between August 8 and 12, prior to commencement of fair share fee deductions, Council 13 mailed a notice to fair share fee payers advising that the Council had determined on the basis of its audited expense figures for the preceding year that the fair share fee to be charged would be 88.55% of normal union dues, explaining the basis of that calculation, and outlining the rights of fee payers who wished to challenge the fee's amount. Pet. App. 17a-18a.

Council 13's notice contains a detailed list of expenditure categories classified as either chargeable or nonchargeable. Pet. App. 46a-49a. The notice also contains the audited figures, by major expense category, of expenditures by Council 13 and by the AFSCME National Union during the previous fiscal year; these audited figures are further broken down to show the chargeable and nonchargeable expenditures in each major expense category. Pet. App. 51a-56a.

Council 13's notice, in addition, explains that each fee payer has forty-five days in which to challenge the amount of the fee, that such challenges would be heard by an impartial arbitrator appointed by the American Arbitration Association in proceedings where the Union bears the burden of proving that the fee is in the correct amount, and that, during a challenge, Council 13 would escrow 100% of the challenger's payments. Pet. App. 59a-60a.

b. *The Proceedings In This Case.* Shortly after fair share fee deductions began, the petitioners filed the instant lawsuit challenging the Pennsylvania statute on its face and as applied under the agreement between the Commonwealth and Council 13. Pet. App. 13a. The petitioners moved for a temporary restraining order and preliminary injunction against the deduction of fees. Pending a hearing on the preliminary injunction, the district court granted a temporary restraining order against the further deduction of fees. Pet. App. 14a-15a.

The preliminary injunction hearing was held on September 9, 1988. Pet. App. 18a. At this hearing, Council 13 bound itself to change the definition of chargeable expenditures to exclude certain per capita payments to affiliated labor federations and to refund the portion of collected fees attributable to such payments, thereby reducing the fee to 85.89% of dues (rather than the

original 88.55%), and to escrow 100% of all agency fees collected pending completion of its internal procedures if any fee payer made a challenge. Pet. App. 6a & n.3 and 23a.

On September 15, 1988, the district court denied the petitioner's motion for a preliminary injunction and vacated the temporary restraining order against the collection of fair share fees. Pet. App. 30a-31a. After considering each of the petitioners' contentions, the district court concluded that the petitioners were unlikely to prevail on the merits since it appeared that Council 13's notice and its objection procedures satisfy the constitutional requirements stated in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). That court summarized its findings as follows:

> After carefully reviewing the procedure implemented by the defendants to effectuate the collection of fair share fees, the court concludes that it comports with the constitutional requirements set forth in *Hudson* and its progeny. [Pet. App. 30a.]

The court of appeals unanimously affirmed the district court's denial of a preliminary injunction. Pet. App. 12a. The court of appeals begins by reviewing, and approving, the district court's findings that Council 13's procedures adequately protect the interests of fee payers identified in *Hudson*. Pet. App. 7a-9a. The appellate court then goes on to rule that in light of the fact that Council 13 was holding all collected fees in escrow during any challenge to the fee, the petitioners could not establish irreparable injury. Pet. App. 9a-11a. Finally, the court of appeals reviewed this Court's precedents regarding the appropriate remedy in agency fee cases, and concluded that those precedents teach that issuing a preliminary injunction here would be improper. Pet. App. 11a-12a.[1]

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[1] So that the Court is fully informed, we note that during the appeal of the interlocutory order at issue here, the parties filed

ARGUMENT

The *certiorari* petition focuses on the abstract question of whether a court may deny a plaintiff's request for a preliminary injunction prohibiting the collection of agency fees if the plaintiff has demonstrated some—undefined—failure by a union to meet the requirements on assessing and collecting such fees stated in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) Pet. 6-17.[2]

The petitioners justify this abstract approach by attributing an equally abstract position to the court of appeals, *viz.*, that because this case involves only a temporary loss by the petitioners of the use of a limited sum of money, injunctive relief is *per se* inappropriate. Pet. 12-13.

The petitioners' effort to create an issue worthy of this Court's consideration, where none exists, is doubly flawed:

First, the court of appeals adapted no such *per se* rule regarding the propriety of preliminary relief in *Hudson* cases. "The traditional standard for granting a preliminary injunction requires the plaintiff to show that in

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cross-motions for summary judgment on the merits in the district court. Thereafter, on August 10, 1989, after the *certiorari* petition was filed, the district court issued an opinion concluding that in most respects there are no disputed issues of material fact and that in these respects Council 13's fair share fee notice and procedures satisfy *Hudson*'s requirements. The district court has, in addition, scheduled a trial for August 24 on the single issue "whether the expense figures for AFSCME International have been verified by an independent auditor."

We are lodging copies of the district court's August 10, 1989 opinion with the Clerk of this Court.

[2] Very briefly stated, *Hudson*, as both of the courts below note, Pet. App. 8a & 21a, enunciated three requirements for the collection of agency fees: "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 475 U.S. at 310.

the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). Both of the courts below applied this standard in determining that the preliminary injunction sought by the petitioners should not issue. Pet. App. 7a & 19a.

Second, the district court after a full preliminary injunction hearing held that the petitioners had *failed* to show any *Hudson* violation here. (As we have noted, *supra*, pp. 4-5 n.1, the district court has confirmed this preliminary finding in most respects in a summary judgment ruling that, aside from one limited issue which has been set for trial, Council 13's procedures do satisfy *Hudson*.) Thus even if petitioners were right in their argument that a showing of *some* violation would by itself suffice to justify preliminary relief, the courts below were correct in denying a preliminary injunction in this case.

In short, this is a case in which the law of the Commonwealth at issue is in accord with the Constitution, the lower courts reached a correct result by exercising their sound discretion according to well settled standards, and in which *certiorari* should therefore be denied.

a. The court of appeals opinion begins by noting that the pertinent facts are "set forth at length in the district court's opinion," and that "what may constitute irreparable harm in a particular case is, of course, dependent upon the particular circumstances of the case." Pet. App. 4a. And the court of appeals quotes the district court's finding that "the fair share collection procedures adopted by the Union as detailed in its notice to fair share fee payers comported with the requirements set forth . . . in *Chicago Teachers Union Local No. 1 v. Hudson* . . . ." Pet. App. 7a.

It is in this context—*viz.*, a context in which the plaintiff has failed to convince a district court that there is any *Hudson* violation—that the court of appeals observed that Council 13's decision to escrow "the entire

amount of all fair share fees deducted, from non-challengers as well as challengers, until disposition of the challenges by an impartial arbitrator," provides such a significant safeguard to the fee payers' interests that no irreparable injury has been shown. Pet. App. 8a-9a.[3]

Given the substantial protections afforded fee payers by Council 13's objection procedures—which provide an advance reduction, a detiled notice and expedited arbitration, *see* pp. 2-3, *supra*—the court of appeals' determination that the Council's further action in escrowing *all* fair share fees pending arbitration fully protects fee payers against irreparable harm while this litigation proceeds cannot be faulted.

b. The petitioners' basic underlying complaint is that Council 13 failed to fully meet the requirements established in *Chicago Teachers Union v. Hudson*, *supra*, in one limited respect, *viz.*, that the Council's notice reflects an allegedly improper fee calculation and thus the notice must be deemed to be inadequate. Pet. 20-22.[4]

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[3] The court of appeals states that its decision is "not intended to intimate any opinion regarding the ultimate merits of plaintiffs' case," Pet. App. 12a n.7, but this does nothing more than invoke the familiar rule that "it is generally inappropriate for a federal court at the preliminary injunction stage to give a final judgment on the merits." *University of Texas v. Camenisch*, 452 U.S. 390, 395 (1981).

[4] The petitioners also maintain that Council 13's notice should have been mailed 45 days before deductions began, or, alternatively that the Union should have held all fair share fees in escrow until the 45 day objection period had run. Pet. 18-20. In the court below, these two points were treated separately, and both were rejected because the district court found that Council 13 would not actually receive the fees deducted in August 1988 until the end of September. That being so, the court found that "the Union will not have access to the fair share fees until after the 45-day period for objecting has expired." Pet. App. 30a. Since the August deductions have already occurred, this part of the controversy is moot for present purposes.

The district court concluded that the petitioners were unlikely to prevail on the merits of this claim because Council 13's notice does provide an explanation of the basis on which the Council calculated the fee that is more than sufficient to enable fee payers to determine whether there is a basis for challenging the fee:

> [T]he purpose of the notice is to enable dissatisfied non-union members to form a basis for their objections to the amount of their fair share fees. The notice here is adequate for that purpose and whether it is in fact accurate is irrelevant to that determination. [Pet. App. 27a.]

The district court held that "substantive challenges to the amount of the fee . . . are more properly considered by the impartial decisionmaker . . ." Pet. App. 30a.

The district court based its understanding of the "purpose of the notice" on this Court's explanation in *Hudson* that "potential objectors be given sufficient information to gauge the propriety of the union's fee." Pet. App. 23a, quoting *Chicago Teachers Union v. Hudson*, *supra*, 475 U.S. at 306.

The Seventh Circuit has recently reached the same conclusion in approving a virtually identical notice sent to fee payers by another AFSCME Council. *Gilpin v. AFSCME*, 875 F.2d 1310, 1316 (7th Cir. 1989). That court described the AFSCME notice and explained the basis for sustaining that notice under *Hudson* in terms that echo the opinions below:

> The notice indicates which activities the union considers to be wholly or partly in pursuit of its agency mission, and what percentage of each expenditure item is allocated to that mission. This should be enough information . . . to allow the employee to decide whether there is any reason to mount a challenge. [875 F.2d at 1316.]

Indeed, the petition itself, which repeatedly frames the petitioners' objections in terms of both the "calculation

and notice," Pet. 20, demonstrates that the notice provides sufficient information to permit fee payers to frame challenges to the calculation of the fee. *See also* Pet. 21 ("the notice and calculation are inadequate"), and *id.* ("the notice and procedures incorporate arbitrary and overbroad standards for chargeable costs").

The petitioners, in other words, have failed to identify any sound basis for questioning the conclusion of the courts below that Council 13 fully met the *Hudson* requirements. That being so the courts below were correct in denying the petitioners preliminary relief.

c. Contrary to petitioners' assertion, there is no conflict between the decisions below and the decisions in *Lowary v. Lexington Local Bd. of Ed.*, 854 F.2d 131 (6th Cir. 1988), and *Gibney v. Toledo Bd. of Ed.*, 40 Ohio St. 3d 152, 532 N.E.2d 1300 (1988).

In *Lowary*, the Sixth Circuit held that a preliminary injunction should issue against the collection of an agency fee equal to full union dues based on the district court's finding that " 'the defendant union's failure to comply even minimally with the notice procedural safeguard outlined in *Hudson* makes it appear likely that the unions will be found to have violated the plaintiffs' First Amendment rights,' . . ." *Lowary v. Lexington Local Bd. of Ed.*, *supra*, 854 F.2d at 133. In the instant case, by contrast, Council 13's fair share fee is less than normal union dues, and the district court found that Council 13's procedures *do comply with Hudson*, a finding which the petitioners contest in only one limited respect.

In *Gibney*, the Ohio Supreme Court approved a final judgment enjoining the collection of fees based on the trial court's uncontested finding, after trial, that the union defendant's "procedures for refunds and rebate disputes were unconstitutional." *Gibney v. Toledo Bd. of Ed.*, *supra*, 532 N.E.2d at 1302. The preliminary injunction in *Gibney* did *not* bar collection of fees, but

ordered an escrow of the fees being collected pending final judgment. *Id.*, at 1302.

(d) We have emphasized that this is a case in which the district court found that Council 13 met the *Hudson* requirements and in which petitioners have shown nothing to the contrary. That being so, we have indulged petitioners' supposition—which has no relevance here—that a preliminary injunction against the collection of agency fees is required where a court finds there is substantial, but not complete, compliance with the *Hudson* requirements, and where the union escrows 100% of the fees pending arbitration of any challenge to the fee. In what may be an excess of caution, we conclude by showing the petitioner's position in this regard is contrary to this Court's precedents regarding the appropriate relief in agency fee cases. *See* Pet. App. 11a-12a.

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), on which the court of appeals relied, this Court considered a Michigan statute that had been authoritatively construed to allow unions to apply an objector's fee payments to the financing of partisan political activity. *Id.* at 232-233. Nevertheless, the Court held that the state court was correct in denying broad injunctive relief, *id.*, at 240-241, reiterating the point made in *Machinists v. Street*, 367 U.S. 740, 771 (1961), that "[s]ince . . . [*Railway Employes' Dept. v.*] *Hanson* [, 351 U.S. 225 (1956),] had established that the union-shop agreement was not unlawful as such, . . . to enjoin enforcement would '[sweep] too broadly.'" *Id.* at 238.[5]

As *Abood* shows, the "objective" of "preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability

[5] Justice Stevens' concurring opinion in *Abood*, 431 U.S. at 244, and footnote 22 to *Hudson*, 475 U.S. at 309 n.22, which petitioners cite as limiting *Abood*'s remedial holding, address what might be appropriate in terms of *final* injunctive relief upon the finding of a violation *after* a trial on the merits.

to require every employee to contribute to the cost of collective bargaining activities," cuts against the broad preliminary injunctive relief the petitioners seek in this case. *See Chicago Teachers Union v. Hudson, supra*, 475 U.S. at 302, quoting *Abood v. Detroit Board of Education, supra*, 431 U.S. at 237.[6] Thus, as the court of appeals said, the denial of preliminary relief here "conforms with Supreme Court precedent [in] fair share/agency fee [cases] . . ." Pet. App. 11a.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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[6] *Elrod v. Burns*, 427 U.S. 347 (1976), on which the petitioners place principal reliance, does not conflict with *Abood*'s discussion of remedies. As the *Abood* opinion explains, the preliminary injunction in *Elrod* was issued to "prohibit a State from compelling any individual . . . to associate with a political party as a condition of remaining in public employment." 431 U.S. at 235 (citations omitted). The Court expressly held that the excess charge imposed on the *Abood* plaintiffs did not result in the sort of direct infringement of First Amendment rights that justified the preliminary injunction in *Elrod*. *Id.*, at 232-233 & 238.